TRADE COMPETITION AS A JUSTIFICATION. — Since the case of the Gloucester Grammar School[1] in 1410 the law has steadily[2] recognized an interest in freedom of trade competition.[3] With the growth of commercial activity that interest has received increasing consideration.[4] Today such widely divergent forms of activity — injurious to individuals or to classes of individuals — as price-cutting,[5] insistence on exclusive dealing agreements,[6] strikes,[7] boycotts,[8] and even the inducing of breach of contract,[9] are found justified by authority, although

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on the ground that it delegates legislative power than the Supreme Court. United States *v.* Blasingame, 116 Fed. 654 (S. D. Cal., 1900); United States *v.* Matthews, 146 Fed. 306 (E. D. Wash., 1906); United States *v.* Grimaud, 170 Fed. 205 (S. D. Cal., 1909). See United States *v.* Louisville & N. R. Co., 176 Fed. 942 (N. D. Ala., 1910). But the Grimaud case has been reversed, and the others in effect overruled, by the Supreme Court. United States *v.* Grimaud, 220 U. S. 506 (1911). *Accord:* United States *v.* Breen, 40 Fed. 402 (Circ. Ct., E. D. La., 1889); United States *v.* Ormsbee, 74 Fed. 207 (E. D. Wis., 1896); Dent *v.* United States, 8 Ariz. 413, 76 Pac. 455 (1904); United States *v.* Deguirro, 152 Fed. 568 (N. D. Cal., 1906); United States *v.* Domingo, 152 Fed. 566 (D. Idaho, 1907); United States *v.* Bale, 156 Fed. 687 (D. S. D., 1907); United States *v.* Moody, 164 Fed. 269 (W. D. Mich., 1908); Lockwood *v.* United States, 178 Fed. 437 (3rd Circ., 1909); United States *v.* Rizzinelli, *supra;* United States *v.* Stephens, 245 Fed. 956, 965 (D. Del., 1917); United States *v.* Olson, 253 Fed. 233, 238 (W. D. Wash., 1917); United States *v.* Casey, 247 Fed. 362 (S. D. Ohio, 1918); United States *v.* Scott, 248 Fed. 361 (D. R. I., 1918); Sugar *v.* United States, 252 Fed. 74 (6th Circ., 1918); United States *v.* Pennsylvania Central Coal Co., 256 Fed. 703 (W. D. Pa., 1918).

It is significant that not only has the Supreme Court never held a Congressional statute unconstitutional on the ground that it violates the doctrine said to prohibit the delegation of legislative powers to the executive departments, but it has reversed decisions of the lower federal courts holding *contra.* Prather *v.* United States, 9 App. D. C. 82 (1896) (writ of erro dismissed — 164 U. S. 452 (1896)); *In re* Kollock, 165 U. S. 526 (1897); *In re* McCaully, 165 U. S. 538 (1897); Wilkins *v.* United States, 96 Fed. 837 (1899) (writ of certiorari denied — 175 U. S. 727 (1899)); United States *v.* Grimaud, *supra;* Selective Draft Law Cases, 245 U. S. 366, 389 (1918); McKinley *v.* United States, 249 U. S. 397 (1919).

[1] Y. B. 11 HEN. 4, fol. 47, pl. 21 (1410). This was an action by the two masters of the grammar school against the defendant for establishing a rival school whereby their receipts were reduced. It was held that the action would not lie. For another early case involving competition see Y. B. 22 HEN. 6, fol. 4, pl. 23 (1443).

[2] Even the early English statutes against regrating, forestalling, and ingrossing, although in fact stifling to business activity, were enacted in the interest of free individual competition. For a general discussion of these statutes see 3 STEPHEN, HISTORY OF THE CRIMINAL LAW, 199.

[3] It should be noted that our ancestors were concerned with free competition because of its effectiveness in reducing prices. See S. C. T. Dodd, "The Present Legal Status of Trusts," 7 HARV. L. REV. 157, 159; COKE, THIRD INST., 195.

[4] Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598 (1889), is probably the leading case on the subject. See S. C. Basak, "Interference with Trade," 28 LAW QUAR. REV. 52, 68.

[5] Mogul Steamship Co. *v.* McGregor, *supra.* See KALES, CONTRACTS AND COMB. IN RESTRAINT OF TRADE, § 94.

[6] Scottish Co-op. Wholesale Soc. *v.* Trade Defense Assoc., 35 SCOT. L. REP. 645 (1898); United Shoe Machinery Co. *v.* La Chappelle Co., 212 Mass. 467, 99 N. E. 286 (1912).

[7] Karges Furniture Co. *v.* Union, 165 Ind. 421, 75 N. E. 877 (1905); Pickett *v.* Walsh, 192 Mass. 572, 78 N. E. 753 (1906).

[8] Mills *v.* U. S. Printing Co. 91 N. Y. Supp. 185 (1904).

[9] Chambers *v.* Baldwin, 91 Ky. 121, 15 S. W. 57 (1891). The weight of authority, however, is *contra.* Lumley *v.* Gye, 2 El. & Bl. 216 (1853). See H. Gerald Chapin, "Interference with Contractual Relations," 1 N. J. L. REV. 144, 161.

in varying degree,[10] as incidents of a free competition in which the law has an interest.[11] But despite a venerable past of judicial elucidation the limits of trade competition as a justification are far from certain. This much, however, seems clear: nothing can be gained by trying to delimit the phrase "trade competition."[12] With each individual trying to get for himself as much of the world's goods as possible,[13] all parties to the economic struggle become competitors.[14] Between any two persons the competition may be worked out through numberless transactions and through the medium of many intervening parties; or it may be immediate. In any event, it exists. And the day of the self-sufficient husbandman having passed, there is no phase of economic activity that does not directly or indirectly partake of the nature of buying and selling, *i.e.*, trade.[15]

Trade competition is not an end in itself. Normally, however, it stimulates to industry, promotes invention and the elimination of waste, results in lowered prices and the improving of service,[16] and it is hard, therefore, to imagine circumstances in which there is not some interest in it as a means to these desirable ends.[17] This interest is buttressed, moreover, by one in freedom of individual action,[18] which must always be curbed where free competition is suppressed. Permitting a free competition secures these two interests, — one social, the other

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[10] Thus the strike for higher wages is legal everywhere, while the secondary boycott is legal probably only in California. Parkinson *v.* Bldg. Trades Council, 154 Cal. 581, 98 Pac. 1027 (1908). The secondary boycott here referred to is called by some writers the compound. See LAIDLER, BOYCOTTS, 64 and 177 *et seq.*

[11] The short list here given is by no means exhaustive. For some discussion of what may be justified by competition see Bruce Wyman, "Competition and the Law," 15 HARV. L. REV. 427.

[12] Attempts, however, have been made. See Edward F. McClennan, "Rights of Traders and Laborers," 16 HARV. L. REV. 237, 249; Jeremiah Smith, "Crucial Issues in Labor Litigation," 20 HARV. L. REV. 253, 357. As well as the logical difficulty involved, such attempts almost led to disastrous results in the case of labor disputes, since the conflict between employers and employees was thought at first (and even now at times) to fall outside of the definitions laid down. See H. Gerald Chapin, *supra*, at 158; CLARKE, LAW OF THE EMPLOYMENT OF LABOR, 287. See Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077 (1896); Berry *v.* Donovan, 188 Mass. 353, 74 N. E. 603 (1905).

[13] "One of the eternal conflicts of which life is made up is that between the effort of every man to get the most he can for his services and that of society . . . to get his services for the least possible return." *Per* Holmes, J., dissenting in Vegelahn *v.* Guntner, 167 Mass. 92, 108, 44 N. E. 1077, 1081 (1896).

[14] "I have seen the suggestion made that the conflict between employers and employees is not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term free competition, we may substitute free struggle for life. Certainly the policy is not limited to persons of the same class competing for the same thing. It applies to all conflicts of temporal interest." *Per* Holmes, J., in Vegelahn *v.* Guntner, 167 Mass. 92, 107, 44 N. E. 1077, 1081 (1896).

[15] The word "trade" in the phrase "trade competition," while originally of a quite definite significance, serves now only to confuse. See Jeremiah Smith, *supra*, 356 and 357. The word "economic" might better be substituted.

[16] See 2 TAUSSIG, PRINCIPLES OF ECONOMICS, c. 65.

[17] This involves, of course, an acceptance of current economic theory. But see REEVE, THE COST OF COMPETITION.

[18] See Roscoe Pound, "Interests of Personalty," 28 HARV. L. REV. 343, 355.

individual.[19] But the results of free competition are complex, and there may occur cases wherein the securing of those two will result in injury to other interests, social and individual, so serious that the loss is greater than the gain. In such instances, trade competition is not a justification. Thus where workmen are induced to break their contract of employment, it is generally held that there is no justification.[20] It is considered more desirable to secure the community in its transactions, even at the expense of social and individual interest involved in a free competition, than to preserve the latter at the expense of security of transactions. But if there is no contract, and the security of transactions, therefore, is not menaced, advantages of free competition clearly outweigh the injury to the tenuous relation[21] that exists between the employer and the employee at will.[22] The interest in security of transactions is not, however, the only one that may be persuasively balanced against freedom of trade competition. In a recent Alabama case[23] the plaintiff, injured while in the employ at will of a construction company insured with the defendant, refused to compromise and turned his claim over to an attorney. The defendant thereafter, by threatening to cancel its insurance, forced the construction company to discharge the plaintiff. The latter was given a cause of action. Here free competition,[24] if permitted, would secure to the insurance company its freedom of action and to society, doubtless, in the long run certain advantageous results, but it would involve an interference with the freedom of action of the employee and with his right of recourse to legal assistance, a right in which the law has amply demonstrated its interest.[25] This complex of results is not so desirable as the complex attained by eliminating the method of competition here used, and trade competition, therefore, was not accepted as a justification.[26] To catalogue and decide all the cases in which trade competition may be offered as a justification would be impossible, but those mentioned

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[19] There is also a social interest in the individual interest in freedom of action. See KALES, *op. cit.*, §§ 1, 2.

[20] So. Wales Miners Fed. *v.* Glamorgan, [1905] A. C. 239; Printers Club *v.* Blosser Co., 122 Ga. 509, 50 S. E. 353 (1905). See William Schofield, "The Principle of *Lumley* v. *Gye*, and its Application," 2 HARV. L. REV. 19.

[21] Merrill *v.* W. U. Tel. Co., 78 Me. 97, 2 Atl. 847 (1896).

[22] Allen *v.* Flood, [1898] A. C. 1; Bowen *v.* Matheson, 96 Mass. 499 (1867); Nat. Prot. Assoc. *v.* Cumming, 179 N. Y. 315, 63 N. E. 369 (1902). See Beekman *v.* Marsters, 195 Mass. 205, 211, 212, 80 N. E. 817, 819 (1907).

[23] U. S. Fidelity & Trust Co. *v.* Millonas, 89 So. 732 (Ala. 1921). — The plaintiff was injured while in the employ of a construction company insured with the defendant. The plaintiff refused the defendant's offer of settlement and sought the aid of an attorney. In accordance with its custom when a workman refused to compromise but sought legal aid, the defendant caused the construction company to discharge the plaintiff, who was not under a contract of employment, by threatening to cancel its insurance. *Held*, that the plaintiff recover.

[24] The object of the competition here was the difference between the defendant's offer and the plaintiff's demand. Note that the parties are competitors within Lord Fry's definition of competitors as those "who seek to enjoy or possess the same thing." Mogul Steamship Co. *v.* McGregor, *supra*, at 626.

[25] Note the attorney-client privilege. See 4 WIGMORE, EVIDENCE, § 2291.

[26] A well-reasoned case in accord is London, etc. Trust Co. *v.* Horn, 206 Ill. 493, 69 N. E. 526 (1903).

indicate how the decision must always be reached. In some cases the process of balancing complexes of results may have long ago resulted in a crystallized rule behind which the courts rarely look to regard the substance. This is doubtless the case with a method of competition so anti-social as violence. But new cases will arise that will fit under no rules, or analytical counsel may question the old. Then courts must seek fundamentals. In particular they must ask whether trade competition in the type of case before them is worth more than it costs.[27] If the answer is not in the affirmative, trade competition is not a justification.[28]

It may be doubted whether a court is competent to apply a rule so broadly framed as the above. When, for example, in the field of labor disputes, a court allowed trade competition to justify a strike for higher wages [29] but not a secondary boycott [30] for that purpose, was it really competent to determine that the compromise on the question of wages arrived at through a struggle thus limited would be the one socially most desirable? And while, of course, some of the cases in which trade competition is offered as a justification are so clear that there could scarcely be error,[31] in the main there is presented to the courts a vast medley of problems where the considerations are nicely balanced and where the final decision should be preceded by thorough and extended investigation, and must depend on views of expediency, policy, social and economic theory; problems, in short, that call for law making rather than law declaring. In this field the legislature should be exhorted to act.[32] But if the problems press for decision before legislative aid arrives, the courts, keeping in mind fundamental considerations, should deal with them.[33] For a refusal to act decides something as clearly as does the issuance of an injunction.

JURISDICTION TO CONFISCATE DEBTS. — A sovereign in the exercise of his war powers can confiscate all property of the enemy found within

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[27] In the recent case of Gottlieb *v.* Matchin, 191 N. Y. Supp. 777 (1921), picketing, although generally legal in New York, was enjoined in the case of a strike of the employees of a milk company. The danger to the health of the community and the particular hardship on invalids and children were given by the court as the persuasive considerations. This is a striking application of the mode of attack argued for above.

[28] In the field of monopoly the distinction between fair and unfair methods of competition has long been seen to turn on the desirability of the results which the practice in question will achieve. See W. H. S. Stevens, "Unfair Competition," 29 POL. SCI. QUAR. 282; CLARK, CONTROL OF TRUSTS, 103.

[29] Karges Furniture Co. *v.* Union, *supra*.

[30] Auburn Draying Co. *v.* Wardell, 227 N. Y. 1, 124 N. E. 97 (1919).

[31] Mr. Albert M. Kales apparently believes that the courts customarily attempt nothing beyond such cases. See the "Prefatory Note" to his CONTRACTS AND COMBINATION IN RESTRAINT OF TRADE.

[32] " . . . government, politically organized society, should meet each emergency requiring alteration of municipal law by the employment of such governmental agencies as in their nature are best suited for the purpose." *Per* Fred F. Lawrence, "Precedent *vs.* Evolution" 12 MAINE L. REV. 169, 171.

[33] See Fred F. Lawrence, *supra*, at 175.